IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

THELMA LOUISE HAINLINE,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas,
*Counsel for Petitioner.*

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled action on March 26, 1963, reversing the judgment of the United States District Court for the District of Kansas.

## CITATIONS TO OPINIONS BELOW

The unreported opinion of the District Court (R. 43-49) is printed in Appendix A, p. A4. The opinion of the Circuit Court of Appeals, printed in Appendix B, p. A13, is reported in 315 F 2d 153.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 26, 1963. No motion for rehearing was presented. The jurisdiction of this court is invoked under 28 U.S.C.A., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether an Air Force officer while participating in the activities of an aero club, a non-appropriated activity sponsored and controlled by the Air Force, is acting within the scope of his employment so as to impose liability on the United States under the Federal Tort Claims Act?

2. Whether under 28 U.S.C.A. 2411 (b) and 31 U.S.C.A 724 (a) the District Court had authority to award interest against the United States from the date of judgment?

## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are sections 1346 (b), 1402 (b), 2401 (b), 2411 (b); 2671 and 2674 of the Federal Tort Claims Act. These statutory provisions are printed in Appendix C, page A19.

## STATEMENT OF THE CASE

This suit was brought under the Federal Tort Claims Act, 28 U.S.C.A. 1346 (b), 2401 (b) and 2671-2680 for personal injuries sustained by plaintiff on November 23, 1959, when the pickup truck she was driving on a public road was struck by an airplane piloted by First Lieutenant Henry E. Goff. Lt. Goff, as part of his regular military duties, had

just completed Pilot School at the McConnell Air Force Bas but was not yet qualified to fly military aircraft. He was taking Ground School Training at the base and at the time of this accident was taking flight instruction as a member of the McConnell Air Force Base Aero Club (R. 29). Goff had joined the Aero Club on the previous day and such flight instruction at the time of the accident was being given pursuant to the articles and by laws of such club and Air Force Regulation No. 34-14 (R. 49) (Appendix E, p. A39).

The McConnell Air Force Base Aero Club was organized in 1957 (R. 40). Its purpose and objective as reflected in its articles and by laws (R. 49) was

> "* * * to stimulate an interest in aviation, to provide authorized personnel with an opportunity to engage in flying as a recreational activity and to encourage and develop skills in aeronautics, navigation, mechanics and related aero-sciences useful to the Air Force Mission."

On or about June 1, 1959, the accounts of the club were turned over to the central accounting office for non-appropriated funds at the McConnell Air Force Base. This office serviced five sundry funds, one of which was the aforementioned Aero Club (R. 41).

The term "sundry funds" was defined by Air Force Regulation 176-1, Appendix D herein, as follows:

> "Sundry funds and activities are established and maintained by income derived from the active membership of the activity or association for the benefit of the membership and bona-fide guests. Sundry funds and their activities do not receive dividends or grant assistance from revenue producing or welfare funds other than as provided in paragraph 11 g. Active membership is composed of limited groups of military per-

sonnel on active duty, eligible civilian employees or any combination of the two * * *".

This Aero Club was at all times under the direct control of the Air Force. It was governed by a board of Air Force officers and one civilian assigned by McConnell Air Force Base, special order number A-775 dated June 3, 1959 (R. 59). Air Force Regulation 34-14, paragraph 6, Appendix E herein, specifically states that Air Force base commanders will supervise club operations. When the club was first organized the Air Force loaned two or three planes to the club (R. 40-41). The club did well financially and was able to purchase the plane that was involved in this accident (R. 40). Title to the plane was taken in the name of SAC Aero Club, Inc. (R. 55).

In joining this Aero Club, Goff paid an initiation fee of $10.00. He paid $7.00 per hour for the privilege of piloting the Cessna 172 involved in this accident (R. 29).

Pursuant to regulation 176, Appendix D herein, Article VI of the McConnell Air Force Base Aero Clubs' Constitution contained the following provision (R. 51):

*"Liability*

"Hull insurance shall be carried on all mortgaged Aero Club aircraft for the protection of the members. *Liability protection is provided by the Government in accordance with Air Force Regulation 176-8.* * * *."

Thus on October 1, 1958, the Air Force cancelled all liability insurance covering non-appropriated activities, A.M.C. JAG Bulletin, 1 June 1959, Appendix D, page A23. It was petitioner's contention that the Air Force Regulations manifested an intention that such non-appropriated activities were "Federal agencies" within the meaning of the Federal Tort Claims Act and that Lt. Goff was acting

within the scope of his employment as a participant in activities of such federal agency. Accordingly, liability insurance for the protection of the public was not deemed necessary under the Air Force interpretation of Regulation 176-8.

The District Court found that Lt. Goff was negligent, and further found that as a member of an Aero Club he was engaged in the activities and pursuits provided for in the constitution of such club, and was acting within the scope of his employment as an employee of such club within the meaning of the Federal Tort Claims Act (R. 15). The District Court awarded damages in the amount of $12,467.46 together with interest thereon from April 25, 1962 (R. 19).

The United States appealed the ruling of the District Court and the United States Court of Appeals for the Tenth Circuit reversed the district court and entered judgment for the United States.

Petitioner seeks a writ of certiorari to review the judgment entered by the United States Circuit Court of Appeals for the Tenth Circuit reversing a prior judgment for plaintiff.

## REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Tenth Circuit has decided an important question of federal law affecting the Air Force administration of its non-appropriated instrumentalities in a manner which appears to conflict with Air Force Regulations and the opinion rendered by the United States Court of Appeals for the Fourth Circuit in *United States of America v. Holcombe*, 277 F.2d 143 (1960) and this court in *Standard Oil Co. v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168.

In *Standard Oil Co. v. Johnson, supra*, this court held army post exchanges, a non-appropriated activity of the army, are arms of the United States Military establishment and integral parts thereof. This court held:

> "* * * Post Exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and practices under them establish the relationship between the post exchange and the United States Government and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined.
>
> * * * *
>
> "On July 25, 1895, the Secretary of War under authority of Congressional enactments, promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of army posts. *That the establishment and control of post exchanges* have been in accordance with regulations rather than specific statutory directions *does not alter their status, for authorized War Department regulations have the force of law.*"
>
> *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968.
>
> *Gratiot v. United States*, 4 How. 80, 11 L. Ed. 884.
>
> "The government assumes none of the financial obligations of the exchange. *But government officers, under government regulations handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership* * * * From all this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions." (Emphasis supplied).
>
> *Standard Oil Co. v. Johnson, supra.*

In its opinion in this case, the United States Court of Appeals did not appear to recognize the force and effect of the Air Force regulations peculiarly applicable to non-appropriated fund activities. As demonstrated in *Standard Oil Co.* v. *Johnson*, *supra*, these regulations have the force of law and should be construed accordingly.

> "(f) The Secretary (of the Air Force) may prescribe regulations to carry out his functions, powers, and duties under this title."
>
> 10 US.C.A., Sec. 8012.

> "These regulations (Air Force regulations) have been worked out with great care and precision by the highest governmental authority under the terms of the statute * * *".
>
> * * *
>
> "These regulations *are made applicable to C.A.P. Passengers by Air Force Regulations* * * *".
>
> *United States* v. *Alexander*, 234 F.2d 861.

Thus in the case at hand, Air Force Regulation 176-8, Appendix D, p. A23, recognized that an employee of a non-appropriated fund activity was interpreted to include members and participants of such activity while they are using such property in the manner and for the purpose provided in the constitution or by laws of the activity. Air Force Regulation 176-8, footnote 6 states:

> "For the purpose of paragraph 14 of this regulation 'employees' is interpreted to include members and or authorized 'participants' or 'users' of nonappropriated fund airplanes, boats, hobby shops, etc., when they are using such property in the manner and for the purpose provided in the constitution, charter or by-laws of the activity."

In this particular case, Lt. Goff was using the club airplane in the manner and for the purpose provided in the by laws of the club's constitution.

The United States Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Holcombe, supra,* held:

> "An officer's mess being an integral part of the military establishment and an agency of the Government according to the usual meaning of the word and having been held to be such in other context it is difficult to escape the conclusion that the Federal Tort Claims Act encompasses it."

The Government contended that non-appropriated instrumentalities such as the officer's mess are not federal agencies within the meaning of the Federal Tort Claims Act. It was contended that such non-appropriated instrumentalities were not supported by appropriations from the United States but were financed by its own operation. The court disposed of this contention by stating:

> "The statute 28 U.S.C.A. Section 2671 provides in part:
>
> " 'Federal agency includes the executive departments and independant establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.' No reason is given by the Government why looking to the terms of the act an appropriated activity of the Navy should be deemed included in one of the above categories but not a non-appropriated activity. The language of the statute making no such distinction it would appear to include both."
>
> *U.S.* v. *Holcombe, supra.*

The Solicitor General did not apply for a writ of certiorari to review this decision.

The decision concluded that the United States was liable for the negligence of an employee of a non-appropriated fund activity acting in the scope of her employment.

The United States Circuit Court of Appeals for the Tenth Circuit does not cite *U.S.* v. *Holcombe, supra,* in its opinion. The Holcombe case settles the issue as to whether a non-appropriated fund activity such as an Aero Club is a federal agency within the meaning of the Federal Tort Claims Act. Accordingly, if the Aero Club in this case is a federal agency, then 28 U.S.C.A. 2401 (b) defines employees of the government as including:

> "* * * Members of the military or naval forces and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States whether with or without compensation."

The record will disclose that the purpose of the federal agency involved in this case was to provide flight instruction in the use and operation of aircraft. Each member of the club was acting on behalf of this federal agency when he was operating one of its airplanes.

The Tenth Circuit Court of Appeals would limit the application of the Federal Tort Claims Act to salaried employees of the non-appropriated fund activity. This limitation appears to be without support in the act itself or the decisions under the act. If this decision is permitted to stand, a non-appropriated fund activity could escape liability under the act by conducting its operation through its individual members rather than through employees hired for that purpose.

In *Paitno* v. *United States,* 311 F.2d 604 (1962), the Tenth Circuit Court of Appeals stated:

> "The fact of employment is in a different category. The States may not decide for the United States who are

and who are not Federal employees because the existence of Federal employment is a Federal question to be answered by application of Federal law."

Petitioner contends that the question of whether Lt. Goff was an employee of a federal agency is a federal question to be determined by federal law. Thus in *Pattno* v. *United States, supra*, the court found an air national guard regulation to be persuasive as to the fact of employment. The purpose and control of the flight was further examined.

Accordingly in this case the Air Force Regulation 176-8 should be persuasive as to whether Lt. Goff was an employee of the Aero Club. Further, since Goff's flight was under the control of a federal agency, that fact should establish his employment with that agency.

Petitioner has no quarrel with the Tenth Circuit Court of Appeals' statement that Kansas law controls the application of respondeat superior. *Williams* v. *United States*, 350 U.S. 857, 76 S. Ct. 100. The Tenth Circuit has applied the doctrine of respondeat superior on the supposition that the United States Air Force was the master and Lt. Goff was the servant when in actuality the Aero Club and Air Force were the joint employers and Lt. Goff was the servant of both. Since *U.S.* v. *Holcombe, supra*, there appears to be no question but that a non-appropriated fund activity (*i. e.* officer's mess) could act in the role of a master in carrying out its functions under the general supervision of the U.S. Navy. On this basis, Lt. Goff was acting in the scope of his employment in carrying out the functions of the Aero Club and the Air Force satisfying the requirements of Kansas Law on respondeat superior.

"The simple test is whether they were acts within the scope of his employment; not whether they were done

while prosecuting the master's business; but whether they were done by the servant in furtherance thereof and where such as may fairly be said to have been authorized by him.'"

*Kemp* v. *Railway Company*, 91 Kan. 477, 138 Pac. 621.

"In determining whether a person is the servant of another it is necessary that he not only be subject to the latter's control or right of control with regard to the work to be done and the manner of performing it, but that the work is to be performed on the business of the master or for his benefit. Actual control of course is not essential. *It is the right to control which is determinative.*

"Under the doctrine of *respondeat superior* a person may be the servant of two masters, not joint employers at one time as to one act, if service to one does not involve abandonment of the service to the other."

*Voss* v. *Bridwell*, 188 Kan. 643, 364 P.2d 955 (1961).

Petitioner contends that the Tenth Circuit Court of Appeals has construed the Kansas law on respondeat superior too narrowly in reaching its decision.

"The maxim applied here is a familiar one: *Qui fait per alium facit per se*. That which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person * * *".

*Kansas Lumber Co.* v. *The Central Bank of Kansas*, 34 Kan. 635, 9 Pac. 751.

The court further places undue emphasis on the fact that Lt. Goff derived some personal benefit from participating in the activities of the Aero Club.

"True it was in part to accommodate the servant but the truck was taken and used in part at least for the ac-

commodation of the defendant and the promotion of his business."

*Snyder* v. *Eriksen*, 109 Kan. 315, 198 Pac. 1080.

The record in this case will not indicate that Lt. Goff was engaged in an activity for his sole benefit. It shows that he was acting under the direction and control of the Air Force and the commanding officer of the Aero Club in the furtherance of the purposes set forth in Air Force Regulation.

In summary, we have the Air Force organizing and supervising Aero Clubs, furnishing planes for their use, setting into motion hazardous instrumentalities at the risk of the public to further the training mission of the military establishment. It was not the intention of Congress in enacting the Federal Tort Claims Act that persons injured through the operation of such federal agencies would be denied recovery for their injuries and damages.

2. In the event the judgment is reinstated, the interest should be awarded from the date of judgment pursuant to 28 U.S.C.A. 2411 (b), Appendix C, p. A19.

There appears to be a conflict in the provision of 28 U.S.C.A. 2411 (b) and 31 USA 724 (a). Repeals by implication are not favored. Accordingly 28 U.S.C.A. 2411 (b) should be given consideration in determining this question. This problem is sufficiently important to the administration of the Federal Tort Claims Act that the opinion of this court should be secured on this feature.

The only case directly in point construing these provisions under the Federal Tort Claims Act is *United States* v. *Jacobs*, 308 F.2d 906. The Fifth Circuit appears to treat Sec. 2411 (b) as repealed by 31 U.S.C.A., Sec. 724a.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

PAYNE H. RATNER,
*Counsel for Petitioner.*

Date

# APPENDIX A

## Findings of Fact and Conclusions of Law

### FEDERAL DISTRICT COURT FOR THE DISTRICT OF KANSAS

The Court, having heard the evidence in the above entitled matter on the 11th and 12th of April, 1962, and having heard arguments of counsel, makes the following Findings of Fact and Conclusions of Law:

### Findings of Fact

1. This is an action brought under the Federal Tort Claims Act (Sections 2671 through 2680) and in compliance with Section 2401 (b) and 1346 (b) of Title 28 of the United States Code.

2. Plaintiff Thelma Louise Hainline was operating a 1957 Chevrolet pickup truck, going east on the Benton Road adjacent to the north line of Nelson Airfield, which was being operated by the SAC Aero Club of McConnell Air Force Base, on November 23, 1959, at about 5:15 p.m.

3. On that same day Lt. Goff, a commissioned officer of the U.S. Air Force and a member of the SAC Aero Club, was operating a 172 Cessna Aircraft No. N 6938A on his solo flight, and while making his final approach to land was flying at such a low altitude that the right landing gear of the aircraft collided with the top and front edge of the cab of the pickup truck being driven by Thelma Louise Hainline.

4. The cause of the collision is solely attributable to pilot error on the part of Lt. Goff.

5. Plaintiff has expended the sum of $722.70 for medical and hospital expenses as a result of the accident. Plain-

tiff's 1957 Chevrolet pickup truck was damaged to the extent of $444.76, the amount being stipulated to by the parties.

6. Plaintiff Thelma Louise Hainline has suffered physical and mental pain, injuries to her mind and body and loss of gainful employment, past and future, and future medical expense, in the amount of $11,300. Plaintiff's total damages, past and future, are in the amount of $12,467.46.

## Conclusions of Law

The Court concludes as a matter of law:

1. That there is jurisdiction in the Federal Court as to the issues and parties involved in the above-entitled matter.

2. That the SAC Aero Club, McConnell Chapter, was an instrumentality of the United States of America on November 23, 1959; that Lt. Goff was a commissioned officer in the United States Air Force and a member of the Aero Club.

3. Non-appropriated funds and their related activities are established by authority of the Secretary of the Air Force and are instrumentalities of the United States Government; that Aero Clubs are Sundry Fund Activities (AFR 176-1).

4. Non-appropriated fund instrumentalities are "federal agencies" within the meaning of the Federal Tort Claims Act.

5. Aero Clubs are designed to stimulate an interest in aviation; to provide authorized personnel with an opportunity to engage in flying to develop skills in aeronautics and related aero sciences useful to the Air Force mission at a limited cost to the government (AFR 34-14).

6. This is a tort claim arising from the acts of a member of a non-appropriated fund activity in the use of property. A "member" is to be considered an "employee" within the meaning of the Federal Tort Claims Act when such member is engaged in the activities and pursuits provided for in the constitution of the Aero Club (AFR 176-8).

7. A member of an Aero Club, who is engaged in the activities and pursuits provided for in the constitution of such Club, is "acting within the scope of his employment" as an "employee" of such Club, all wthin the meaning of the Federal Tort Claims Act.

8. The Court finds Lt. Goff was negligent in the operation of the Cessna Aircraft in flying too low over a public road on which Thelma Louise Hainline was driving, and that the negligence of Lt. Goff was the proximate cause of plaintiff's injuries.

9. Thelma Louise Hainline was not negligent in her operation of the 1957 pickup truck.

10. John Hainline suffered no compensable loss as a result of this accident.

11. Judgment should be rendered for the plaintiff, Thelma Louise Hainline, and against the United States of America, in the sum of $12,467.46 and the osts herein.

12. Judgment should be rendered for the defendant, and against the plaintiff John Hainline.

Dated this 25th day of April, 1962.

Luther Bohanon
United States District Judge

Filed April 26, 1962.

**Unreported Opinion of Trial Court As Announced from the Bench**

However, after reviewing all of the evidence and hearing the argument of counsel, there are two very difficult questions that I have in mind (Tr. 222).

First is whether or not the Government is liable, as counsel has just pointed out. That question is whether a member of a non-appropriated funds activity, whether it is an instrumentality of the Government and can impose liability on the Government through that non-appropriated funds organization, and whether his negligence is the negligence of the Government.

Now the fact that the SAC Aero Club operated through a corporation I think is of very little if any importance. I rather think that the plan behind the corporate idea is to get away from having title to any property or properties in a trustee, because trustees, if they started out with a trust arrangement or an individual title ownership of property, soon the personnel in this Post would move to another Post and on goes the movement of personnel in the service.

So there would always be conflicts or problems with reference to the transfer of title to airplanes, title to any other property they have out of one who is transferred from one Post to another.

So it was decided, and I think rightly and properly so, that they would have a non-profit corporation, and I am sure that's universal. You change the officers, your stockholders or trustees, and as one leaves why they appoint another but title is still in that corporation. I think that must have been the purpose of the corporation (Tr. 223-224).

Therefore, the fact that it is a corporation, it is not a corporation to defeat any of the Government's liability at all.

Now then, the fact that the title to the plane was not in the Government, but was in this organization, I think is of little consequence. The Government so controlled the corporation, so controlled its activities, so controlled what it could and couldn't do, what it could borrow, what it could buy, the Commanding Officer has so much to do with the Board of Directors of this corporation that it is under his control so completely that the title to the plane, I can't see that it's of any great significance.

Then I have reviewed the order of the Post, that is the McConnell Air Force Base order of the 3rd of June, 1959, wherein it provides for the organization of the corporation and the officers, that is the SAC Aero Club, McConnell Chapter.

I think that's rather significant, and I think it is basically how it got started.

Then next the Articles of the Constitution, which though they carry a subsequent date to the date of this accident, the Court holds that even though the Articles of the Constitution of the Aero Club in truth and fact was the operations of the Club from the very beginning as provided in the Articles of the Constitution, whether this was just late in adopting or whether it was really a standard form of constitution for Aero Clubs throughout the country and throughout the world. They have these clubs everywhere, according to the information (Tr. 224-225).

Then looking at the Air Force Regulation No. 176-1a, under date of 1960, it supersedes Air Force Regulation 176-1a of September, 1959.

Then also Regulation, Air Force Regulation 176-1 which supersedes Air Force Regulation 176-1 of June 20, 1956, and Article 2, or Section 2, paragraph 2, "Categories of Non-Appropriated Funds and Activities. Non-Appropriated funds and their related activities are established by authority of the Secretary of the Air Force and are not incorporated under the laws of any state or District of Columbia. These funds and activities are instrumentalities of the United States Government, and as such are entitled to the sovereign immunities and privileges of the United States as provided in the Constitution and statutes and in International Law, treaties", and so forth. Which shows that these matters are just not a local thing.

Then I want to refer to Section 13 of the same Air Force Regulation, "Military personnel may be used on full-time duty" * * * "for supervisory or operational purposes when specifically authorized in manning documents. If assigned to a non-appropriated fund activity as a primary duty, they will not be paid by the non-appropriated fund for performing such duty." (Tr. 225-226).

Well, that shows such concern for the welfare that to me there can be no question as to the liability.

Then I want to refer further to Air Force Regulation No. 176, under date of September, 1957, paragraph 2, "Categories of Non-Appropriated Funds and Activities", which is somewhat the same as I just read; and Air Force Regulation 176-8, under date of January 28, 1960, which supersedes Air Force Regulation 176-8, July 5, 1956, and Sections 13 and 14.

Section 13 relates to Public Liability Insurance and Products Liability Insurance. Section 14 relates to Tort Claims: Tort Coverage and Procedures, which when stud-

ied further convinces the Court of the intent of the Government to control.

Then Air Force Regulation No. 176-8, under date of July 5, 1956, over on Section C-11, "How Tort Claims are Settled."

Then Exhibit 20, Plaintiff's Exhibit, which is United States of America, Department of the Air Force, Wright-Patterson Air Force Base, Ohio, December 18, 1961, and attached to that is Air Force Regulation of March 2, 1959, which is a Judge Advocate dissertation on many problems, but under Roman numeral III, "Claims", Section 304 (1), "Tort Claims Generated by Non-Appropriated Fund Activities", there's quite a paragraph there. I won't take time to read it, but it convinces me further that this activity is one that makes the Government liable (Tr. 226-227).

*The* continuing on to paragraph 304 (1), just a continuation, the last paragraph on--the pages are not numbered but I marked it, is very convincing.

Then Air Force Regulation No. 34-14, under date of September 30, 1960, which supersedes Air Force Regulation 34-14 of 14 April '59, deals specifically with Air Force Aeronautic Clubs; and Sections 5 and 6, Section 5, "Assignment of Personnel", Section 6, "Command Supervision of Club Operations".

Then Air Force Regulation 34-14, under date of April 14, 1959, paragraph 2, "Purposes of Aero Clubs", and then in the same Regulation is paragraph 3, "How to Establish Aero Clubs", and paragraph 6 has to do with the assignment of personnel, and 6, "Command Supervision of Club Operations. Commanders will supervise club operations to insure that"—it means a lot of things there.

All in all, I am convinced that members of the clubs, when they are performing activities as the Lieutenant was

in this case, preparing himself to be a better pilot—that's pure and simple what it was—he had a little stake in it personally. He was paying some small but minor fees. The Government through the Air Force wanted him to do that.

They go to a lot of trouble, time and expense to have him do it, to better prepare him for his duties later in the service (Tr. 227-228).

So it is the finding of the Court that Lt. Goff was in the status of a member of an instrumentality of the Government. Though he was a member of a non-appropriated funds organization, his activities and his negligence in this case are such that the Government does become liable for his negligence.

I think that he was negligent, that this lady driving that truck along there—she was on a street provided for the traveling public, she had no way of knowing that this plane was coming down, I doubt that she could have heard it if she had had the windows down. I doubt that she would have been prudent if she were to have been gazing into the clouds rather than looking at the road where she was driving.

We hear so much that if you are driving a car, keep your eye on the road, your hand on the steering wheel. If she had taken her eye off the road and run into somebody, why then she would have been negligent.

But here this plane obviously cut its power and it wasn't making any noise, and what noise it was making was behind it. She'd have had to have been looking all the time, if she was going to watch all the time in the clouds. It would have been well if she could have taken time to see and known but certainly the Court can't attribute negligence to her for not having seen it (Tr. 228-229).

I don't think the law would expect her to come to that cut-off road and there just stop and wait and look to see, because once they get started these planes move in so fast she would have found herself in the path of a plane maybe if she had stopped and looked.

The fact she didn't have her window down I don't think is contributory negligence. The fact that she didn't look and see the plane isn't contributory negligence.

I can't help but believe that the Government here, though it may be a close case, but I am convinced that the Government was negligent. They put in motion the thing that caused this woman her trouble. Certainly she didn't put in motion the thing that caused her trouble.

Now we get down to the question of just what this liability is or the extent of this liability, and the Court does have some trouble there because I think normally a person whose truck was hit like this pickup truck was, I mean someone that's not too easily excited and maybe not too much overweight, not having any bones broken or ligaments torn loose so far as the evidence shows, would have gone on back to work the next day.

We find a plaintiff here who is not 100% well, in the sense that this shock did more to her than it would a normal person, but we find that she has suffered much difficulty (Tr. 229).

Now how much of that difficulty is as a result of this plane landing gear hitting on the top or the edge of this cab of the pickup truck is a difficult question; but nevertheless the Court finds that inasmuch as the Government is liable, first the Court finds that the damage to the pickup truck as stipulated by the parties is $444.76, and that will be the finding and judgment of the Court in that regard

The Court finds that from a tabulation of this plaintiff's hospital and doctor bills and medical care bills there is a total of $722.70. I understand your stipulation was $716.00. I think that if the true figures—I have them here—show that it's $722.70, why I will permit plaintiff to amend claim to cover exactly what it was and no more, no less; but if from a calculation of these medical expense bills it's something less than $722.70, we then make it what it should be.

Now we come to the question of this plaintiff's loss and damages. I cannot help but think and I must think that had it not been for this accident like it happened, she would have gone on at least for a while working as she did with her husband, doing hard manual labor. She is yet of an age—I never heard of hard work hurting anyone, just so long as they don't get sunstroke or something like that.

But just how much of her inability to work is contributed by her overweight? I'm convinced from the testimony that her overweight had something to do with it, but I believe that in fairness to both parties, plaintiff and defendant, that the defendant should be required to and it will be the order of this Court, that they pay this plaintiff a sum of $50.00 a week for three years. That would be a total of $7,800; now that's some in the future in order that she may have time to take treatment that she wants and the doctor said she needs and it will do her some good (Tr. 230-231).

I think she should take these treatments. I think the husband and the wife both have made a mistake by saying that they didn't have the money to hire a doctor and be treated. The first thing I think they should do is concern themselves with treatment and get well, and the fact they didn't have money is not too good an excuse, but then it is their excuse

The evidence shows that within six months she should be restored to where she can work again, and therefore the compensation to her will be $7,800.

Now then, the evidence shows that she has suffered. No, the evidence shows that she will need medical care and attention. I didn't get it too clear as to what that would amount to, but I think the Court should allow the plaintiff in a measure of damages the sum of $1,500 for future medical care and attention.

Now then, this woman I think has really suffered some with her back. The evidence is not so strong that she suffered with her back as she has with these severe headaches. The evidence is clear that they are a resulting element of damages from this accident, and the Court feels that this pain and suffering that she has had, the sum of $2,000 would adequately and reasonably compensate her for severe headaches and pain (Tr. 231-232).

The Court finds that plaintiff has a life expectancy of 46.1 years. The Court does not find that she has got permanent disability, wholly and completely resulting from this airplane hitting the cab. The evidence is clear she had no broken bones, no fractures, there is no skull injury. She had some lacerations and bruises, and those are all well now.

Therefore the Court finds and orders that the over-all judgment for the plaintiff, as outlined by these various items, will amount to $12,467.46. That will be the total amount of the judgment for the plaintiff and against the defendant.

The Court denies the plaintiff John Hainline any recovery at all. I think I have taken care of that (Tr. 232).

Filed August 24, 1962

**Journal Entry of Judgment**

Based upon the Findings of Fact and Conclusions of Law entered herein, it is the

Order, Judgment and Decree of the Court that the plaintiff Thelma Louise Hainline have and recover judgment in the amount of $12,467.46, together with interest thereon from the date hereof, and her costs.

It Is Further Ordered, Adjudged and Decreed that judgment be and is hereby entered for the defendant United States of America and against plaintiff John Hainline, denying John Hainline, plaintiff, any recovery herein.

Dated this 25 day of April, 1962.

Luther Bohanon
United States District Judge

Filed April 26, 1962.

**APPENDIX B**

# United States Court of Appeals

TENTH CIRCUIT.

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No. 7118

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MARCH TERM, 1963.

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UNITED STATES OF AMERICA,
Appellant,

vs.

THELMA LOUISE HAINLINE,
Appellee.

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Appeal from the United States District Court for the District of Kansas.

315 F.2d 153

David L. Rose, Attorney, Dept. of Justice, Washington, D.C. (Joseph D. Guilfoyle, Acting Ass't Attorney General, Newell A. George, U.S. Attorney, and Morton Hollander, Attorney, Dept. of Justice, Washington, D.C., with him on the brief), for Appellant.

O. J. Connell, Jr., El Dorado, Kansas, for Appellee.

Before MURRAH, Chief Judge, and PICKETT and LEWIS, Circuit Judges:

PICKETT, Circuit Judge.

This action was brought, under the provisions of the Federal Tort Claims Act,[1] to recover damages for injuries received by the plaintiff when an airplane flown by Lieutenant Goff, an Air Force officer, struck the motor vehicle she was driving. The plane was owned by the Aero Club at McConnell Air Force Base in Butler County, Kansas. Lieutenant Goff was a member of the club which maintained aircraft for the use of its members on a rental basis. Membership in the club was voluntary, and limited to active and retired military personnel, their dependents, and civilians employed by the Department of Defense. The club is a nonappropriated fund activity of the Air Force, and an instrumentality of the United States. It was alleged that Lieutenant Goff, while flying the plane, "was acting within the scope of his duties and in line of duty as a member of the United States Air Force."

The trial court concluded: "A 'member' [of the Aero Club] is to be considered an 'employee' within the meaning of the Federal Tort Claims Act when such member is engaged in the activities and pursuits provided for in the constitution" of the club, and that when a member of the club is engaged in activities and pursuits provided for in the constitution of the club, he is acting within the scope of his employment, thus subjecting the United States to liability under the Act. Judgment was entered for the plaintiff, Thelma Hainline, in the sum of $12,467. The question presented by this appeal is whether an Air Force officer, while off duty, and flying as a member of a nonappropriated, sundry fund activity,[2] an airplane which is owned by the club not the government, is acting within

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1. 28 U.S.C. §§1346(b), 1402(b), 2401(b), 2671-2680.

2. Sundry fund activities are established and maintained by income derived from the active membership of the activity.

the scope of his employment as an officer in the Air Force or as an employee of the activity, so as to subject the United States to liability for his negligence.

There is no material dispute over the controlling facts. The purpose of the Aero Club was to stimulate an interest in aviation, to provide authorized personnel with an opportunity to engage in flying as a recreational activity, at economical rates, and to encourage and develop skill in aeronautic navigation, mechanics and related sciences useful to the Air Force mission. Air Force Regulation 34-14 (April 14, 1959). The activities of the club were limited to off-duty hours of the members, and the club officers were required to fulfill their club duties on their own time. Some of the planes used were borrowed from the Air Force, and others, including the one flown by Lieutenant Goff, were purchased with club funds and on the titles to those planes the club was designated as the owner. The club's income was derived from the dues and initiation fees of members, the sale of flying services, including instruction, the rental of planes, and the sale of gasoline. Lieutenant Goff was a licensed pilot, and on the day of the collision, in which the plaintiff was injured, he obtained the use of a Cessna 172 for a flight at the usual charge of $7.00 per hour. He was not directed by anyone to make the flight, and he was at liberty to utilize his off-duty hours as he saw fit. Flights such as this were his sole responsibility, and he was not accountable to the Air Force or anyone else as to the flying of the plane. He was making a final landing approach at the air field which the club leased when the plane's landing gear struck a truck which was being driven by the plaintiff on a road adjoining the field. The finding that the Lieutenant was negligent and the amount of the judgment are not questioned here.

Under the provisions of the Federal Tort Claims Act the United States is liable for injuries to property or per-

sons "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." As to military and naval forces of the United States "acting within the scope of his office or employment" means "acting in line of duty." 28 U.S.C., § 2671; *Hinson* v. *United States*, 5 Cir., 257 F.2d 178; *Leonard* v. *United States*, D. Wyo., 131 F. Supp. 694, aff'd 235 F.2d 330, cert. granted and remanded to trial court on motion of the parties 352 U.S. 996.

In actions brought under the Act, the scope of employment is determined by the state law. *Williams* v. *United States*, 350 U.S. 857; *Pattno* v. *United States*, 10 Cir., 311 F.2d 604. Under Kansas law the liability of an employer for the negligent acts of his employee is controlled by a determination as to whether, at the time of the act complained of, the employee was engaged in the furtherance of the employer's business to such a degree that the employer had the right to direct and control the employee's activities. Liability does not attach to the employer if there is only incidental furtherance of the employer's business. *Willett* v. *McCormick*, 161 Kan. 658, 170 P.2d 821, *Ruff* v. *Farley Mach. Works Co.*, 151 Kan. 349, 99 P.2d 789; *Kyle* v. *Postal Telegraph-Cable Co.*, 118 Kan. 300, 235 Pac. 116; *Mansfield* v. *William J. Burns Int'l Detective Agency*, 102 Kan. 687, 171 Pac. 625; *Kemp* v. *Chicago, R. I. & P. Ry.*, 91 Kan. 477, 138 Pac. 621. At the time of this accident it is clearly established that Lieutenant Goff was flying the club aircraft for his own personal benefit and enjoyment, at his own expense. He was not sufficiently engaged in the furtherance of any business of the Air Force to make him subject to its direction and control.

and, any benefit to the Air Force was only incidental to Goff's private activities. Therefore, he was not acting within the scope of his employment as an Air Force officer, and the United States is not liable under the theory that he was.

The Aero Club was an instrumentality of the federal government, and the United States would be liable under the Federal Tort Claims for the negligence of club employees. Cf. *Rizzuto* v. *United States*, 10 Cir., 298 F.2d 748. In holding that Lieutenant Goff, as a member of the club, was deemed to be an employee thereof the trial court relied upon footnote 6 of Air Force Regulation 176-8 (Jan. 28, 1960) which states:

> "For the purpose of paragraph 14 of this regulation 'employees' is interpreted to include members and/or authorized 'participants' or 'users' of nonappropriated fund airplanes, * * *, when they are using such property in the manner and for the purpose provided in the constitution, charter or by-laws of the activity."

Paragraph 14 of Air Force Regulation 176-8 (Jan. 28, 1960) requires the prompt reporting of an accident or incident involving the act or omission of an employee of a nonappropriated fund activity in connection with its property or services. It deals with the administrative investigation, settlement and payment of claims, and also provides that when any member or authorized user of nonappropriated fund property is sued in his individual capacity as a result of an alleged tort committed by him while using nonappropriated fund property, a request will be made to employ, at club expense, civilian counsel to represent the individual sued. The regulation, however, does not purport to, nor could it, enlarge the liability of the United States under the Federal Tort Claims Act or create any

new or different definition of the word "employee" as used in the Act. For the limited purpose of investigation and administrative settlement of claims arising out of nonappropriated fund activities of the Air Force, the regulation treats members as employees, but this does not make them employees in determining the substantive liability of the United States under the Act. The fact of employment must be determined under federal law,[3] and there is no federal rule to the effect that a club member is an "employee" under the Federal Claims Act.

REVERSED.

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3 *Pattno v. United States*, 10 Cir., 311 F.2d 604.

## APPENDIX C

28 U.S.C.A., Sec. 1346 (b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A., Sec. 1402 (b):

"Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. June 25, 1948, c. 646, 62 Stat. 937; Sept. 2, 1958, Pub. L. 85-920, 72 Stat. 1770."

28 U.S.C.A., Sec. 2401 (b):

"A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in

writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim. June 25, 1948, c. 646, 62 Stat. 971, amended Apr. 25, 1949, c. 92, § 1, 63 Stat. 62."

28 U.S.C.A., Sec. 2671:

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

" 'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

" 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

" 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, § 124, 63 Stat. 106."

28 U.S.C.A., Sec. 2674:

"Liability of United States

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

28 U.S.C.A., Sec. 2411 (a) (b):

(a) "In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(b) "Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judg-

ment. June 25, 1948, c. 646, 62 Stat. 973, amended May 24, 1949, c. 139, § 120, 63 Stat. 106."

31 U.S.C.A., Sec. 724a:

"Appropriations for payment of judgments and compromise settlements against the United States

"There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of sections 2414 or 2517 or Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law: Provided, That, whenever a judgment of a district court to which the provisions of section 2411 (b) of Title 28 apply, is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court to which the judgment was affirmed): Provided, further, That whenever a judgment rendered by the Court of Claims is payable from this appropriation, interest payable thereon in accordance with subsection 2516 (b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office. July 27, 1956, c. 748, Title XIII, § 1302, 70 Stat. 694, amended Aug. 30, 1961, Pub. L. 87-187, §3, 75 Stat. 416."

## APPENDIX D

1. Air Force Regulation AFR 176-1, provides in pertinent part:

SECTION A—GENERAL

1. *Reason for Nonappropriated Fund System.* The Air Force promotes a comprehensive morale-building welfare, religious, and recreational program designed to improve the well-being of its military and civilian personnel and their dependents. Basic facilities, limited personnel, and operating costs of this program are provided from funds appropriated by the Congress for military members and their dependents. Non-appropriated funds generated by Air Force military and civilian personnel and their dependents are used to augment this program.

2. *Categories of Nonappropriated Funds and Activities.* Nonappropriated funds and their related activities are established by authority of the Secretary of the Air Force and are not incorporated under the laws of any State or the District of Columbia. These funds and activities are instrumentalities of the United States Government and as such are entitled to the sovereign immunities and privileges of the United States as provided in the Constitution and Statutes and in International Law, Treaties and Agreements with foreign countries. Three categories are authorized. * * *

c. Sundry Funds and Activities. Sundry funds and activities are established and maintained by income derived from the active membership of the activity or association for the benefit of the membership and bona-fide guests. Sundry funds and their activities do not receive dividends or grant assistance from revenue producing or welfare funds other than as provided in paragraph 11g. Active membership is composed of

limited groups of military personnel on active duty, eligible civilian employees, or any combination of the two. This category includes:

(1) Air Force Central Mess Fund,

(2) Major air command mess funds,

(3) Major subcommand mess funds,

(4) Open messes, and their funds, for officers, noncommissioned officers, and aviation cadets,

(5) Supplemental field ration mess funds (see AFR 146-4),

(6) Air Force Chaplain Fund and installation, organization, or unit chaplain funds (see AFR 176-16), and

(7) Other sundry activities, associations, and funds.

3. *Who is Responsible for Nonappropriated Funds.* The Department of the Air Force will determine basic policies, operational principles, and procedures for nonappropriated funds and related activities authorized by this regulation. The Secretary of the Air Force has vested the responsibility for nonappropriated funds and related activities as follows:

a. Responsibility for Army and Air Force Exchange and Motion Picture Services and funds pertaining thereto is vested in the Board of Directors. Army and Air Force Exchange and Motion Picture Services (See AFR 34-22/AR 15.110). Policies, organization and administration of these funds and activities are established in AFR 147-7/AR 60-10 and AFR 34-32/AR 28-62. These joint regulations are determinative of provisions in conflict with this regulation.

b. Responsibility for civilian nonappropriated funds and related activities is vested in the Board of

Directors, Army and Air Force Civilian Welfare Fund. Policies, organization and administration of these funds and activities are established in AFR 176-5/AR 230-81.

c. Responsibility for all other nonappropriated funds and related activities is vested in the Air Force Welfare Board.

5. *Responsibilities of the Air Force Welfare Board.* Within the area of vested responsibility, the board will:

a. Exercise general control over Air Force nonappropriated funds and related activities.

* * *

11. *What the Policies Are.* Nonappropriated funds and related activities will be administered by a council or board of directors or governors under the supervision of the commander. The commander responsible for the establishment of a nonappropriated fund and related activities will designate or direct the selection of a governing body which will be charged with administering and supervising the fund and activities in accordance with the following policiies:

a. Individuals, installations, organizations, and units have no proprietary interest in the funds, and profits do not accrue to any individual.

b. All actions and proceedings of a council or board of directors or governors will be recorded and will be approved or disapproved by the responsible commander.

c. Nonappropriated funds and related activities will not incur financial obligations which cannot be paid promptly.

d. Nonappropriated funds and related activities will not collect fees or emoluments for licenses, rents,

or privileges that involve using and converting Government-owned or -leased buildings or lands, their crops, natural resources, and wild life.

e. Activities supported by nonappropriated welfare funds will be conducted without cost to military personnel or civilian employees, except when the cost of conducting them exceeds the availability of appropriated funds and authorized resources of welfare funds. In such instances, commanders may authorize nominal service charges to be collected from participants and patrons in amounts that will offset the deficit.

* * *

13. *Use of Personnel:*

a. Military Personnel. Military personnel may be used on a full-time duty basis for supervisory or operational purposes when specifically authorized in manning documents. If assigned to a nonappropriated fund activity as a primary duty, they will not be paid by the nonappropriated fund for performing such duty. However, enlisted personnel may be paid for authorized services performed beyond the normal primary duty day if:

(1) Their employment does not impair or diminish their efficiency in performing assigned military duties,

(2) Such compensation is for actual work performed in an off-duty status, and

(3) Hourly rates of pay, or their equivalent, do not exceed those in effect for civilian employees performing similar services in the military and civilian community.

* * *

4. AMC JAG *Bulletin*, 1 June 1959, 304 (1) *Tort Claims Generated by Nonappropriated Fund Activities* (AFR 176-8B)

With the implementation of DOD Directive No. 5515.6, dated 3 November 1956, by AFR 176-8B, dated 8 September, 1958, claims personnel at both Base and Air Materiel Area level have a vital role in the investigation, processing and adjudication of tort type claims generatel by nonappropriated fund activities within their claims areas. Prior to the implementation of this DOD Directive, these various nonappropriated fund activities carried commercial public insurance in the same manner as private persons, and, when involved in an accident or incident which resulted in loss or damage to third parties determined to be caused by the negligence of the agents or employees of the nonappropriated fund activity, they were protected by such insurance. However, based on the experience gained in overseas areas where such non appropriated fund activities became self-insurers in 1954, it was determined that the abolishing of such insurance coverage in the United States with respect to these activities would result in considerable savings to the activities and to their funds. The cancellation of public liability insurance coverage was made effective 1 October 1958, as to all nonappropriated fund activities without exception. * * *

There will be certain incidents arising out of nonappropriated fund activities which will appear to be more properly considered as analogous to "non combat activities" under 10 U.S.C. 2733 and AFR 112-3 rather than sounding in tort. Such an instance may be one involving the activities of Aero Clubs. * * *

1. Air Force Regulation AFR 176-8, issued January 28, 1960, provides in pertinent part:

13. PUBLIC LIABILITY INSURANCE AND PRODUCTS LIABILITY INSURANCE:

a. *Public or Products Liability Insurance.* A nonappropriated fund activity may not obtain public lia-

bility insurance (for protection against losses arising out of personnel injury, death, and property damage) and products liability insurance (for protection from injury or death resulting from faulty products) from a commercial insurance carrier except in some foreign countries, as noted in paragraph 10c. Any tort claims resulting from acts or omissions of the employees[6] of a nonappropriated fund activity will be reviewed and settled administratively as outlined in paragraph 14. In connection with the payments of tort claims a complete release will be secured from the claimant to protect the individual responsible for the tort in his personal capacity and the nonappropriated fund. Payment of adjudicated claims will be as prescribed in attachment 6.

14. TORT CLAIMS: TORT COVERAGE AND PROCEDURES.

Any claim arising from an accident or incident involving the act or omission of employees of a nonappropriated fund activity in connection with its property or services (except those listed in *a* below), must be reported promptly to the claims officer of the appropriate air command, for investigation and reporting as directed by AFR 112-2 and this regulation.

a. *Claims Not Covered.* The claims listed below are exempt from the procedures set forth above and will be settled as follows:

(1) *Claims cognizable under* AFR 112-6 arising from acts or omissions of military personnel, whether performing assigned military duties or off-duty work,

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6. For the purpose of paragraph 14 of this regulation "employees" is interpreted to include members and/or authorized "participants" or "users" of nonappropriated fund airplanes, boats, hobby shops, etc., when they are using such property in the manner and for the purpose provided in the constitution charter or by-laws of the activity.

and all civilian employees paid from appropriated funds while performing official duties, will be settled as claims against the United States, payable out of appropriated funds.

(2) *Claims cognizable under* AFRs 112-3 or 112-4, arising from acts or omissions of military personnel while performing assigned military duties, and civilian employees paid from appropriated funds, while performing official duties, will be settled as claims against the United States, payable out of appropriated funds.

(3) *Claims arising from acts or omissions of civilian employees who are not citizens of the United States, outside the scope of their employment,* will not be paid from either nonappropriated funds or appropriated funds. However, if civilian employees who are not citizens of the United States were hired in one country for employment in nother, claims for injury, death or damage caused by them may be payable under paragraph 14c this regulation (see also paragraph 7a(3), AFR 112-6).

(4) *Claims arising from accidents or incidents involving motor vehicles dispatched from established* USAF *motor pools on occasional authorized missions for non-appropriated fund activities,* will be settled as claims against the United States, payable out of appropriated funds.

(5) *Claims covered by public liability, products liability, workmen's compensation, or employers' liability insurance contracts* will be settled as provided in the contracts. When the policy limits are insufficient to pay the claim and/or the designated claims settlement authority determines that additional payment should be made, paragraph 14d applies.

(6) *Customer complaints settled by nonappropriated fund officers,* pursuant to paragraph 16.

b. *In the United States, Its Territories and Possessions.* Except for payment, claims will be processed

and settled in the manner authorized in the Federal Tort Claims Act (28 U.S.C. 2672) or the Military Claims Act (10 U.S.C. 2733) as appropriate; or as directed in *d* below and paragraph 16.

c. *In Areas Outside the United States, Its Territories and Possessions.* Except for payment, claims will be processed and settled in the manner authorized in the Claims Act (10 U.S.C. 2734); as authorized by treaties Military Claims Act (10 U.S.C. 2733); in the Foreign or agreements between the United States and the foreign governments concerned; or as directed in *d* below and paragraph 16.

d. *Approving Authority.* Tort claims, except those settled as customer complaints (see paragraph 16), will be adjudicated by staff judge advocates, foreign claims commission, and other designees responsible for the settlement of claims involving appropriated fund activities (see AFR 112-1). Such settlements shall be final and conclusive unless an appeal is authorized for a similar claim against an appropriated fund activity. The approving authority will forward a copy of the completed claim file to the major command headquarters concerned for payment action (attachment 6), when appropriate, except as provided in paragraph 14d(2).

(1) Claims processed in the manner authorized in the Foreign Claims Act (see 14c above) that exceed $5,000 but not $15,000, are subject to the approval of the appropriate air command staff judge advocate, and/or The Judge Advocate General.

(2) Claims in excess of $15,000, processed in the manner authorized in the Foreign Claims Act, and claims in excess of $1,000, processed in the manner authorized in the Military Claims Act (plus any authorized appeal) and claims not in excess of $2,500 processed in the manner authorized in the Federal Tort Claims Act will be forwarded to The Judge Advocate General.

USAF, or his designee for that purpose, who will be the final approving authority, without regard to the procedures and limitations that apply to appropriated fund activities. The decision at this level will be final and conclusive on the claimant; the insurer, if any; and the activity concerned. When a claim is approved The Judge Advocate General, USAF, will forward a copy of the completed claim file to the Board of Directors concerned at Headquarters USAF level for appropriate payment action. (Attachment 6)

e. *Legal Representation for Individual.* When a member or a civilian employee of the Air Force, or other authorized user of nonappropriated fund property is sued in his individual capacity, as the result of an alleged tort committed by him while using nonappropriated fund property and there is information which indicates that such use was in the manner and for the purpose authorized, the nonappropriated fund activity will request the approval of The Judge Advocate General, USAF, to employ local civilian counsel to represent the individual being sued.

(1) A litigation report and investigative file prepared in accordance with AFR 110-3 and AFR 112-2 will be forwarded to Headquarters USAF (AFCJA-15). The Judge Advocate General, USAF will monitor and supervise the activities of the civilian attorneys approved by him. The nonappropriated fund activity involved will provide funds on a reimbursable basis (see attachment 6), for litigation, expenses, judgments, and compromises.

(2) In any case where the use of local civilian counsel has been approved and a judgment rendered against the individual, the matter will be forwarded to Headquarters USAF (AFCJA-15), for a determination whether the nonappropriated fund activity involved should satisfy the judgment.

(3) In cases where a compromise offer is received by the local civilian counsel such offer will be for-

warded to Hq USAF in the same manner as provided for judgments, for a determination as to whether the suit should be settled.

(4) The procedures outlined above are primarily intended to apply to the instances where Aero Club aircraft riding academy, boating activities or similar activities are involved.

f. *Legal Representation for Nonappropriated Fund Activities.* Actions brought against the nonappropriated fund activity or its employees performing their assigned duties as contrasted to actions against individuals in their personal capacities will continue to be processed and representation will be provided by the Department of Justice in accordance with current procedure.

15. PERSONNEL CLAIMS. Except for payment, the claim of a civilian employee of a nonappropriated fund activity for damage or loss of personal property incident to his service will be processed and settled in the manner authorized in the Military Personnel Claims Act (10 U.S.C. 2732). Such settlements shall be final and conclusive. AFR 112-7 procedures will apply, except that for the purposes of this paragraph the term "employee" shall include only those employees of nonappropriated fund instrumentalities described in the Act of June 19, 1952 (66 Stat. 138.5 U.S.C. 150k). Payment of adjudicated claims will be as prescribed in paragraphs 1-3, attachment 6. The approving authority under this paragraph will be effective only with respect to claims accruing after the date of this regulation.

16. CUSTOMER COMPLAINTS. Officers in charge of a nonappropriated fund revenue producing activity will settle a customer complaint type sales or service claim, or a supplier contract dispute by a cash payment, service, or

replacement in kind.[7] If the claim cannot be satisfactorily settled in this manner, or if the claim includes a demand for consequential damages (such as personal injury or property damage other than that to the article purchased or serviced), it will be processed in accordance with paragraph 14 or 17, as applicable.

17. CONTRACT CLAIMS: CONTRACT PROVISIONS AND PROCEDURES. The officer who is responsible for preparing a nonappropriated fund contract, agreement, or purchase order will:

a. Insert the following clause:

*Definition.* As used in this contract, the term "contracting officer" means the persons executing or administering

this contract on behalf of the nonappropriated fund which is a party hereto, or to his successor or successors.

b. Insert the following clause:

*Nonappropriated Fund Activity.* The (*Insert here the name of the contracting activity*) is a nonappropriated fund activity of the Department of the Air Force. No appropriated funds of the United States shall become due or be paid to the contractor by reason of this contract.

c. Insert the following clause in each contract purchase order or agreement, except those listed in subparagraph *d*, below:

*Disputes.* Except as otherwise provided in this contract, any dispute or claim concerning this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall state his decision

7. Examples: Breach of warranty, defective service, errors, shortages, deficiencies, etc

in writing and mail or otherwise furnish a copy of it to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the[8] and the decision of the[9] shall be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. The Contractor shall be afforded an opportunity to be heard and to offer evidence in support of any appeal under this clause; pending final decision of such a dispute, however, the Contractor shall proceed diligently with the performance of the contract and in accordance with the decision of the Contracting Officer.

d. In lieu of the clause quoted in c above, insert the following clause in each contract, purchase order or agreement entered into in a major oversea command and to be performed outside the United States:

*Disputes.* Except as otherwise provided in this contract, any dispute or claim concerning it that cannot be settled by agreement shall be decided by the Contracting Officer, who shall state his decision in writing and mail (or otherwise furnish) a copy of it to the Contractor. Within 30 days from the date the Contractor receives such copy, he may appeal that

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8. Insert "Armed Services Board of Contract Appeals" in all contract dispute clauses applicable to contracts of the Army and Air Force Exchange Service, the Army and Air Force Motion Picture Service and any other nonappropriated fund activity not operated under the exclusive control of the Army or the Air Force. Insert "Secretary of the Air Force," in dispute clauses pertaining to all other Air Force nonappropriated fund activities.

9. Insert "Board" when appeal is to be addressed to the Armed Services Board of Contract Appeals. Insert "Secretary or his duly authorized representative for the hearing of such appeals," in dispute clauses pertaining to all other Air Force nonappropriated fund activities.

decision by mailing (or otherwise furnishing) to the Contracting Officer a written appeal addressed to the major commander designated by the Contracting Officer; the decision of that major commander or his representative authorized to hear such appeals (not the Contracting Officer for this contract), shall be final and conclusive, when the amount involved in the appeal is $50,000 or less, except that, if the Contractor does not appeal within the said 30 days, the decision of the Contracting Officer shall be final and conclusive. If the amount involved is more than $50,000, however, the Contractor may within 30 days after he receives the decision of the above major commander, make further written appeal to the,[10] and the decision of the[11] shall be final and conclusive, except that, if no such further appeal is made within the said 30 days, the decision of the major commander shall be final and conclusive. In connection with any appeal under this clause, the Contractor shall be afforded an opportunity to be heard and to offer supporting evidence; pending final decision of such a dispute the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

e. Amend existing nonappropriated fund contracts or agreements or purchase orders, if the contractor is willing, to include the appropriate "disputes" clause (see *c* and *d*, above).

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10. Insert "Armed Services Board of Contract Appeals" in contract dispute clauses applicable to contracts of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service and any other nonappropriated fund activity not operated under the exclusive control of the Army or the Air Force. Insert, "Secretary of the Air Force" in dispute clauses pertaining to all other Air Force nonappropriated fund activities.

11. Insert "Board" when appeal is to be addressed to the Armed Services Board of Contract Appeals. Insert "Secretary, or his duly authorized representative for the hearing of such appeals" in dispute clauses pertaining to all other Air Force nonappropriated fund activities.

f. Prepare decisions and process appeals under the "Disputes" clause pursuant to Part 5, Section LIV, AFPI. Proceedings before the Armed Services Board of Contract Appeals will be governed by Appendix A, ASPR.

(Note: The coverage extended by these disputes articles is somewhat broader than that provided by the disputes articles used in appropriated fund contracts; see ASPR and AFPI.)

g. Refer for payment by the nonappropriated fund against which the appeal was filed, those decisions under the "Disputes" clause or, in settlement of a pending matter, under the clause which requires payment to the contractor.

h. When the nonappropriated fund governing body considers it necessary, require a contractor or vendor with whom the fund has a contract for goods or services to post collateral or a performance bond to protect the fund from any loss by insuring the fulfillment of the contract.

i. In exceptional cases where the established procedures may not be applicable to certain types of claims arising out of nonappropriated fund activities, submit the case to the Air Force Welfare Board, Headquarters USAF, Washington 25, D.C., for resolution.

**Payment of Tort and Personnel Claims.**

| Type of Claim | Method of Payment |
|---|---|
| 1. Claims arising out of the operation of the Air Force Exchange and Motion Picture Activities. | Paid from exchange or motion picture theatre nonappropriated funds as directed by the Board of Directors, Army and Air Force Exchange and Motion Picture Services, or their designee, in accordance with |

| Type of Claim | Method of Payment |
|---|---|
| | the final award made by claims settlement authorities. |
| 2. Claims arising out of the operation of Air Force base restaurants and civilian nonappropriated welfare fund activities within the United States. | Paid from civilian nonappropriated funds as determined by the Board of Directors, Army and Air Force Civilian Welfare Fund, or its designee, in accordance with the final award made by claims settlement authorities. |
| 3. Claims arising out of the operation of Air Force nonappropriated fund activities, other than those named in 1 and 2, above. | Paid from the welfare or mess fund, as appropriate, of the major air command exercising jurisdiction over the activity concerned[1] in accordance with the final award made by claims settlement authorities, provided the claims are not required to be forwarded to the Judge Advocate General, USAF, as prescribed in Pars 14d(1) & (2) & 15. Claims or appeals adjudicated by the Judge Advocate General, USAF, or his designee for |

1. Welfare funds or mess funds of the major air commands will be reimbursed from the Air Force Central Welfare Fund or Air Force Central Mess Fund as appropriate. Address all requests for reimbursements to: Director of Military Personnel, Headquarters, USAF, ATTN: Air Force Welfare Board, Washington 25, D.C., and give a complete description of the claim, including names of claimants and the nonappropriated fund activity involved. Attach copies of action taken by the claims settlement authorities.

| Type of Claim | Method of Payment |
|---|---|
| | that purpose, other than those listed in 1 & 2, above, will be paid from the Air Force Central Welfare Fund or the Air Force Central Mess Fund, as appropriate.[2] |
| 4. Claims settled pursuant to a treaty or agreement between the United States and a foreign government. | Paid as a responsibility of the overseas commander from Army and Air Force Exchange or Motion Picture Services funds, welfare or mess funds, or by insurers, as appropriate.[3] If primary settlement of claim is made by an agency of the U.S. specifically designated to pay claims to a foreign government, this agency will be reimbursed by the appropriate nonappropriated fund. |

2. Reserves for payment of claims maintained by the Air Force Central Welfare Fund and the Air Force Central Mess Fund may be replenished from time to time as determined by the Air Force Welfare Board.

3. When insurance is maintained by a nonappropriated fund activity in accordance with foreign government requirements, claims settlement authorities of air commands authorized to reimburse foreign governments will take appropriate action to submit this information to the governing body of the nonappropriated fund activity concerned, so that reimbursement action may be taken in accordance with the insurance contract.

## APPENDIX E.

2. Air Force Regulation AFR 34-14, provides:

*AFR 34-14
1-4

AIR FORCE )
REGULATION )
No. 34-14 )

DEPARTMENT OF THE AIR FORCE
Washington, 14 April 1959
Personnel Services

### AIR FORCE AERO CLUBS


| | Paragraph |
|---|---|
| Specific Applicability | 1 |
| Purpose of Aero Clubs | 2 |
| How to Establish Aero Clubs | 3 |
| Membership in Aero Clubs | 4 |
| Assignment of Personnel | 5 |
| Command Supervision of Club Operation | 6 |
| Loan of Aircraft to Aero Clubs | 7 |
| Action by the Aero Clubs | 8 |
| Accountability for Aircraft and Spare Components | 9 |
| Reporting Procedures | 10 |
| Insurance Required | 11 |


*This regulation authorizes commanders to establish Air Force Aero Clubs organized as sundry fund activities, tells them how to do so, and states what*

* This regulation supersedes AFR 34-14, 9 February 1956.
OPI: AFPMP
DISTRIBUTION: B

*controls commanders should place on operation of the clubs. Its provisions, together with other Air Force Regulations cited herein and applicable parts of Civil Aviation Regulations published by the Federal Aviation Agency (FAA), apply to Air Force Aero Clubs worldwide.*

1. SPECIFIC APPLICABILITY.

a. Within the continental United States, commanders will follow the policies and operational principles prescribed by this regulation and other regulations cited above.

b. Outside the continental United States, commanders may augment this regulation in any manner to comply with the rules and regulations of the country in which they are located, provided they do not deviate from the intent of this regulation.

c. This regulation does not apply to aero clubs established as private associations (see AFR 176-1).

2. PURPOSE OF AERO CLUBS. Aero Clubs are designed to stimulate an interest in aviation; to provide authorized personnel with an opportunity to engage in flying as a recreational activity; and to encourage and develop skills in aeronautics, navigation, mechanics, and related aero sciences useful to the Air Force mission.

3. HOW TO ESTABLISH AERO CLUBS.

a. Major air commanders may approve the establishment of aero clubs as sundry fund activities in keeping with AFR 176-1 to operate as instrumentalities of the Federal Government under the auspices of the Air Force.

b. An Air Force aero club must organize under a constitution or charter and by-laws which provide for its operation and dissolution consistent with this and other applicable regulations.

c. An Air Force aero club may carry the name of its base location; for example, a club formed at Randolph Air Force Base may be known as the "Randolph Air Force Base Aero Club."

d. Local policies and regulations may be issued to insure that clubs operate smoothly, efficiently, and properly, provided the policies and regulations are consistent with this and other applicable regulations.

4. MEMBERSHIP IN AERO CLUBS. Membership in an Air Force aero club shall be voluntary. Active membership will be limited to active duty military personnel of the Armed Forces. Associate membership may be extended to the following:

a. Dependents of military personnel.

b. Retired military personnel and their dependents.

c. Civilians employed by the Air Force or by non-appropriated fund activities of the Air Force.

d. Military personnel of foreign governments on duty with the Department of Defense.

5. ASSIGNMENT OF PERSONNEL. Responsibilities for adequate supervision and control of clubs may require limited utilization of personnel to perform the command functions cited in the following paragraph. However, military and civilian personnel, paid from appropriated funds, will not be assigned to clubs specifically to perform maintenance, instructional and general administration, and operational duties. As sundry fund activities, clubs are expected to operate on a self-sustaining basis; therefore, provisions of AFR 176-1, on the use of military personnel are not applicable.

6. COMMAND SUPERVISION OF CLUB OPERATION. Commanders will supervise club operation to insure that:

a. Appropriate operational and administrative procedures are established and followed to insure maximum safety of flight. The rules and regulations of the FAA should be suuplemented, if required, based on the flying experience available within the club.

b. The club maintains an effective air-ground safety program.

c. The club operates on a self-supporting basis in a businesslike manner to assure financial stability, and club fund accounting procedures are consistent with those prescribed by AFM 177-4.

d. Authorization is granted members of Air Force aero clubs to pilot USAF aircraft on loan, provided:

(1) Member holds currently effective airman's certificate issued by FAA for type of aircraft and operation involved, or

(2) Member has not qualified for FAA rating, but is undergoing student pilot training in accordance with current operational procedures prescribed by FAA and the aero club concerned.

e. Coordination and working relationship is established with the local FAA inspector to insure maximum assistance for club operations.

f. Hobby shop facilities and other equipment are made available, when possible, to assist club members in maintaining and repairing aircraft.

g. Sale of petroleum products is in accordance with AFR 67-147.

h. Authorization for use of Air Force installations by aero club aircraft is determined by paragraphs 2a(1) and 11, AFR 55-20, 26 February 1959.

7. LOAN OF AIRCRAFT TO AERO CLUBS. Aero clubs organized under provisions of this regulation operate as instrumentalities of the Federal Govern-

ment under the auspices of the Air Force. As such, the Air Force may loan to aero clubs light aircraft not immediately required for military purposes. The following will apply to the loan of aircraft to aero clubs:

a. Light aircraft will be assigned by Headquarters USAF to major air commands for loan to aero clubs. Distribution to bases within the command and loan to individual aero clubs will be the responsibility of the command concerned. The Base Aircraft Distribution Officer will notify the major air command headquarters concerned when a club determines that an aircraft is no longer needed. The major air command may reassign the aircraft to another aero club within the command. If the aircraft is excess to command aero clubs, notify Hq USAF (AFPMP-12-A), Wash. 25, D.C.

b. Aircraft transferred for purposes of loan to aero clubs will be prepared for one-time flight in accordance with applicable technical orders.

c. The aero club will be responsible for all maintenance or modification of the aircraft after receipt. No maintenance will be provided by Air Force activities after delivery of aircraft to aero clubs.

d. Major spare components—such as engines, propellers, etc.,—in either serviceable or reparable condition, may be loaned to aero clubs for use as spares in support of the loaned aircraft. Loan of such spare components will be limited to items in Air Force stock over and above programmed life requirements for the particular aircraft remaining in the active inventory. Repair and overhaul of these components will be the responsibility of the aero club. Loan of spare components will be in accordance with paragraph 25, Section 5, Volume II, AFM 67-1.

e. Aircraft and spare engines loaned to aero clubs will be maintained in complete condition. There will be no cannibalization for spare parts.

8. ACTION BY THE AERO CLUBS. Upon receipt of the loaned aircraft, the aero club will comply with the following:

a. Remove all USAF, USN, or USA markings.

b. Obtain FAA registration and airworthiness certification. Applications will be made on FAA Form ACA 500, "Aircraft Registration Form." The United States Air Force will be indicated as owner of the aircraft. The aero club, by name and address, will be indicated as operator. Part C, Bill of Sale, of FAA Form ACA 500, is not required when applying for registration of USAF aircraft on loan. The application form will be signed by the Base Aircraft Distribution Officer. A certificate, signed by the same officer will be attached containing the following:

(1) A statement that the aircraft is on loan to the aero club, but that title remains with the United States Air Force; and,

(2) Other conditions of the loan agreement considered pertinent.

c. Accomplish such modifications to loaned aircraft as may be required by FAA for issuance of an Airworthiness Certificate or for continued airworthiness of the aircraft.

d. Operate and maintain USAF loaned aircraft in an airworthy condition under the provision of the Civil Air Regulations.

9. ACCOUNTABILITY FOR AIRCRAFT AND SPARE COMPONENTS.

a. Aircraft on loan to aero clubs are retained on Air Force inventory and may be recalled at any time. They will be accounted for and maintained on the records of the Base Aircraft Distribution Officer.

(1) In the event of transfer of a base from one command to another, the aircraft on loan to the aero

club will remain at the base and accountability will be transferred to the receiving command.

(2) When a base is deactivated, possession of such loan aircraft will be retained by the major command owning the base at the time of deactivation.

b. Major spare components on loan to aero clubs will be accounted for and maintained on the records of the Base Accountable Supply Officer. A separate record file will be maintained by the Base Supply Officer in accordance with paragraph 37, Section 4, Volume II, AFM 67-1.

c. In event of major damage or destruction, disposition will be in accordance with paragraph 8, Section 17, Volume I, AFM 67-1.

10. REPORTING PROCEDURES.

a. Aircraft on loan to aero clubs will be reported in the 110 series reports as Code XY (Loan).

b. Aircraft engines on loan will be reported under the provisions of AFR 65-20 by the Engine Manager of the base. These engines will be reported as Code W, Block 5, on AF Form 1534, "Engine Status Report."

c. Accident reporting will be accomplished as required in Part 62, Civil Air Regulations. In addition to the number of copies of FAA Form ACA 2400, "Pilot Operator Aircraft Accident Report," required by Civil Air Regulations, two additional copies will be prepared and forwarded as follows:

(1) One copy through channels to the major air command headquarters concerned.

(2) One copy mailed direct to:

Hq USAF (AFPMP-12-A)
Wash. 25, D. C.

This request for the above copies of FAA Form ACA 2400 has been approved by Headquarters USAF Reports Control Office.

d. In addition to the above reports, the following addressees will be notified of major accidents or damage to aircraft on loan from USAF.

Hq USAF (AFOOP-AL-AM)
Wash. 25, D.C.
AMC (MCSDD)
Wright-Patterson AFB, Ohio

Include aircraft type, model, and series, Air Force serial number, and whether aircraft is to be retained in USAF inventory, or if it is necessary to terminate property responsibility in accordance with paragraph 8, Section 17, Volume I, AFM 67-1. An information copy will be furnished the major air command concerned.

11. INSURANCE REQUIRED. Provisions of AFR 176-8 give guidance with respect to public liability insurance coverage for Air Force aero clubs, including insurance covering public property damage, public bodily injury, and passenger bodily injury. However, the provisions of that regulation are not applicable to:

a. Individually owned aircraft which may be used by club members. In such cases commercial insurance coverage, as required by AFR 87-7, will be provided by the individual.

b. Hull insurance on aircraft owned by the aero club or individual club members. Hull insurance should not be carried on aircraft on loan from the Air Force. Title to the aircraft rests with the United States Government; therefore insurance companies do not have salvage rights to the aircraft.

Inasmuch as aero clubs are classified as nonappropriated fund activities, commercial public liability

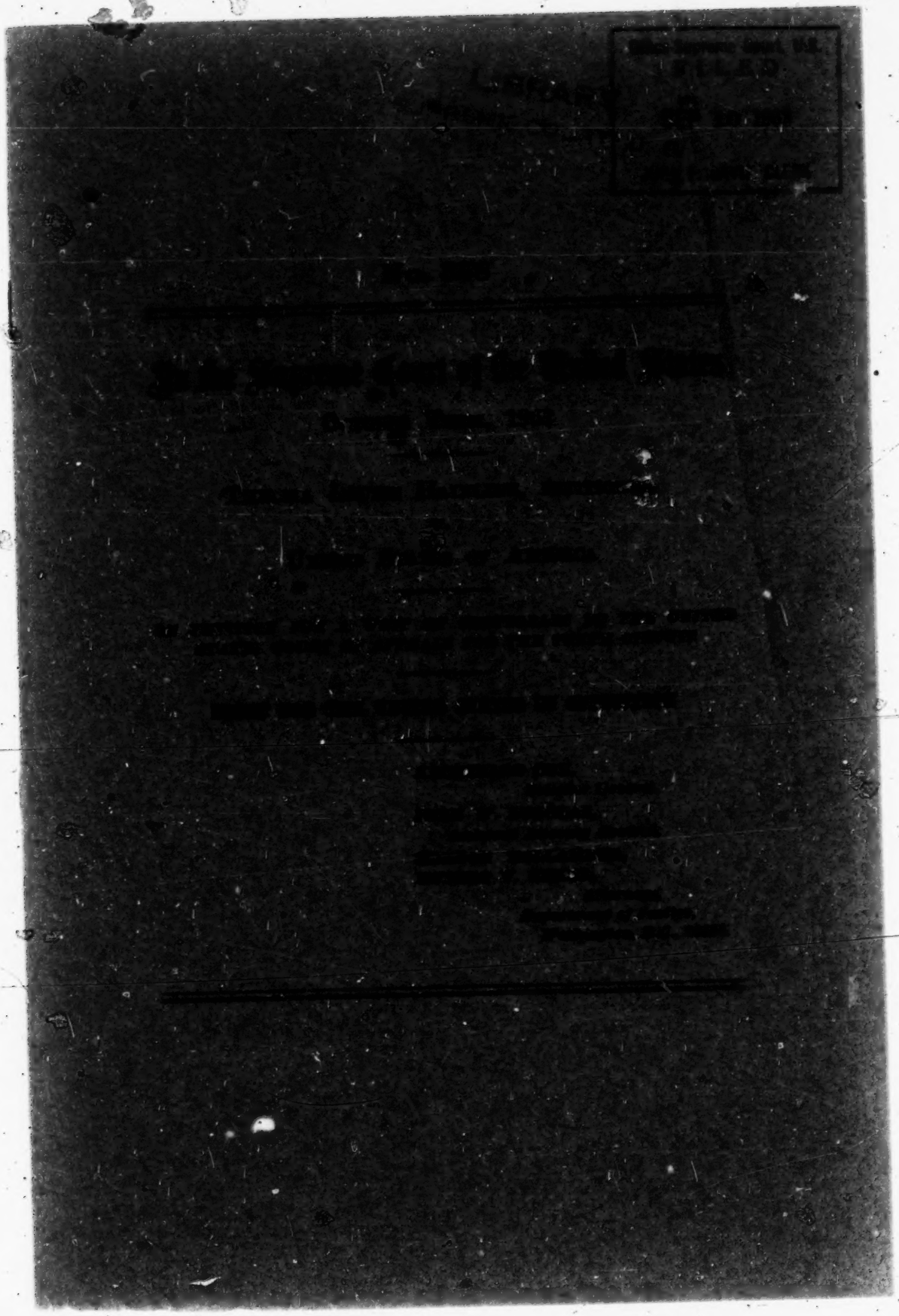
insurance is not required. However, where it is determined that local circumstances make it advisable, such coverage may be obtained when specifically approved by the Air Force Welfare Board. Requests for exception should be submitted through channels to Headquarters, USAF, ATTN: AFPMP-WB. All civilians and foreign nationals riding as passengers will accomplish a Release From Claim For Injury or Death, outlined in AFR 76-6, prior to flights in aero club aircraft.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

THOMAS D. WHITE
*Chief of Staff*

Official:

J. L. TARR
*Colonel*, USAF
Director of Administrative Services



# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 358

THELMA LOUISE HAINLINE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The findings of fact and conclusion of law and the oral opinion of the United States District Court for the District of Kansas (Pet. App. A1–A12) are not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. A13–A18) is reported at 315 F. 2d 153.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1963. On June 24, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 23, 1963. The petition for a writ of certiorari was filed August 10, 1963.



705-087—63

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals properly interpreted the Kansas law of *respondeat superior* in refusing to hold the United States liable for injuries caused by an Air Force officer who, while off duty and for his personal benefit and enjoyment, was flying an airplane owned not by the government but by an Aero Club of which he was a member.[1]

## STATUTES AND REGULATIONS INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, in pertinent part, provides:

§ 1346

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting

[1] Petitioner also raises the question of whether the district court had authority to award interest against the United States from the date of judgment (Pet. 12). A reading of the relevant statutes makes it perfectly clear that the district court had no such authority. 28 U.S.C. 2411(b), 31 U.S.C. 724a. In any event, the court of appeals did not reach the interest point, since it held that no judgment in any amount should have been rendered against the United States.

within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

2. Air Force Regulation AFB 176–8, paragraphs 13 and 14 and attachment 6, is set forth at pp. A27 to A32 and pp. A36 to A38 of the Appendix to the petition for a writ of certiorari.

STATEMENT

This action was brought under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401(b) and 2671–2680) for injuries sustained by plaintiff when the

right landing gear of a Cessna light plane owned by the SAC Aero Club of McConnell Air Force Base, Kansas, scraped the top of her truck (R. 1, 26, 32).

The pilot of the plane, Henry Goff, was a lieutenant in the Air Force, attending Ground School at McConnell Air Force Base for the piloting of B-47 bombers (R. 28–29). When the accident happened he was off duty and the flight did not count toward his flying time for the Air Force. He had joined the Club shortly before the accident and had paid from his own pocket the initiation fee and the charge for flying the plane involved in the accident (R. 28–29). The accident occurred as Goff was making a solo landing approach. The right landing gear of the plane hit the top and front edge of the cab of a truck driven by the plaintiff, who sustained cuts and abrasions, and an abnormal psychological reaction which lessened her ability to work (R. 29, 38–39, 47).

The Aero Club of McConnell Air Force Base was at the time of the accident a nonappropriated fund activity providing its members with recreational flying in light planes (R. 33, 40–41, 49). Membership was voluntary; no one was required to join the Club, and members could resign at any time they wished (R. 40). Civilian employees of the Air Force and retired military personnel and their dependents, as well as personnel on active duty and their dependents, were eligible for membership (R. 50). Activities of Club members were limited to off-duty hours, and officers and instructors of the Club who were also Air Force officers were similarly required to fulfill their Club duties on their own time (R. 30, 33).

Members of the Club were under no affirmative obligation other than to pay dues and fees (R. 50); there was no evidence of a requirement that the members do any flying. Goff was apparently not an officer of the Club nor an instructor hired to teach Club members to fly, but simply a member entitled to use Club facilities.

The district court found that Goff's negligence caused the accident and gave judgment for petitioner in the amount of $12,467.46, with interest from the date of judgment (R. 16). The court of appeals reversed on the ground that, under Kansas law, Goff was not acting within the scope of his employment as an officer of the United States Air Force at the time of the accident.

## ARGUMENT

1. Petitioner's basic contention is that "the Tenth Circuit Court of Appeals has construed the Kansas law on respondeat superior too narrowly in reaching its decision" (Pet. 11). Plainly, that allegation presents no question appropriate for review in this Court. In any event, the decision below is correct. Petitioner concedes, as he must under *Williams* v. *United States*, 350 U.S. 857, that the question whether Goff was acting within the scope of his employment by the Air Force at the time of accident is governed by Kansas law. The court of appeals found that the Kansas courts resolve the question by determining whether the employer had the right to direct and control the employee's activities. Applying this test, the court of appeals held that under Kansas law Goff

was not acting within the scope of his employment as an officer of the United States Air Force at the time of the negligent act (Pet. App. A16–A17). Goff was off duty when the accident occurred and was at liberty to do what he pleased. He was not directed by anyone to make the flight which caused the accident, and the rental charge for the aircraft he was flying came from his own pocket (Pet. App. A15, R. 28–29). As the court of appeals noted, he was acting for his personal benefit and enjoyment and in no way furthering the business interests of the United States at the time of the accident (Pet. App. A16). The Kansas cases relied on by the court of appeals (Pet. App. A16) clearly demonstrate that, in these circumstances, Goff was not, under Kansas law, acting within the scope of his employment as an officer of the United States Air Force.

2. Petitioner also contends that the court of appeals should have affirmed the judgment on the ground that the United States Air Force and the Aero Club were "joint employers" (Pet. 10). To the extent that this "joint employment" contention is not simply an attempt to reargue the question of Kansas law as to the scope of Goff's employment by the Air Force, the argument must rest on two propositions: (i) that Goff was an "employee" of the Aero Club, and (ii) that the Aero Club was a "federal agency," all within the meaning of the Tort Claims Act. But, as the court of appeals held, Goff was plainly not an employee of the Aero Club. He received no pay for flying a Club airplane; indeed, he had to pay from his own pocket the hourly rental fee charged (R. 29).

As a member of the Club, he had no affirmative duty other than payment of fees and dues (R. 50). No one required him to fly the aircraft involved here. There was no evidence that he was an officer of the Club or performed any duties in connection with the administration or operation of the Club. He simply used the Club's facilities, in the same manner that a member of the officers' club might use its golf course or its swimming pool, or a member of the officers' mess might eat his dinner at the mess.[2]

Thus, the fact that Goff was not an "employee" of the Aero Club makes it unnecessary to reach the further question whether the Aero Club is an instrumentality of the United States under *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, and whether, if the Club is such an instrumentality, it is also a "federal agency" within the meaning of the Federal Tort Claims Act. At the same time, the absence of any employment relationship between Goff and the Aero Club refutes the suggestion of conflict between the decision below and *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4). In *Holcombe*, the United

[2] Petitioner cites an Air Force regulation which provides that members of aero clubs are "employees" for the purpose of the paragraph of the regulation concerning administrative review and settlement of tort claims involving nonappropriated fund activities (Pet. 7, Pet. App. A28–A32). However, even if the Air Force had the power to expand the liability of the United States as fixed by the Tort Claims Act, the regulation was clearly not intended to affect Tort Claims Act liability. For payment of claims processed under the regulation is provided for out of nonappropriated funds (AFR 176-8, ¶14d and attachment 6 (Pet. App. A30–A31, A36–A38)), while payment of claims under the Tort Claims Act is made from appropriated funds. 28 U.S.C. 2411(b); 31 U.S.C. 724a.

States was held liable only because the tortfeasor was an employeee—not a member—of an officers' mess. Indeed, the court below was of the view that the United States would be liable for the negligence of an Aero Club employee.

## CONCLUSION

The decision below turns on a question of state law. Moreover, the decision is correct and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
JOHN W. DOUGLAS,
*Assistant Attorney General.*
MORTON HOLLANDER,
ROBERT V. ZENER,
*Attorneys.*

SEPTEMBER 1963.

U. S. GOVERNMENT PRINTING OFFICE 1963